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IN THE

Supreme Court of the United States

No. 71-1032

A. W. THOMPSON, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

and

BILLY J. ARMSTRONG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

A. W. THOMPSON, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

and

BILLY J. ARMSTRONG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the captioned case on November 16, 1971.

I. OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit dated October 25, 1971, is reported at ____ F.2d ____, 66 L.C. 12,139. A copy of such Opinion is appended hereto in accordance with Rule 23 of this Court. The Decision and Order of the National Labor

Relations Board dated June 30, 1970, is reported in 184 NLRB 14. A copy of such Decision is appended hereto.

II. JURISDICTION

The date of the Judgment of the United States Court of Appeals for the Fifth Circuit is November 16, 1971. The Order overruling Petitioner's Petition for Rehearing and Petition for Rehearing En Banc is dated December 29, 1971. Jurisdiction is conferred upon this Court to review the Judgment of the United States Court of Appeals for the Fifth Circuit by Writ of Certiorari by 28 U.S.C.A., §1254.

III. QUESTIONS PRESENTED FOR REVIEW

A. Whether Petitioner violated the National Labor Relations Act by withdrawing recognition from the Union and requesting the Board to conduct an election upon receipt of written statements of 81% of its bargaining unit employees to the effect they no longer wanted to be represented by the Union which had been certified for more than one year.

B. Whether there is substantial evidence to support the Board's finding that Petitioner's officers did not in good faith believe the Union no longer represented a majority of the bargaining unit employees at the time Petitioner refused to bargain further with the Union.

C. Whether there is substantial evidence to support the Board's finding that Petitioner failed to display the degree of diligence that proper performance of its bargaining obligations required.

D. Whether Petitioner violated the Act by attempting to bargain with the Union about a 'bumping' procedure clause after agreement had been reached on all other contract provisions.

E. Whether there is substantial evidence in the Record to support the Board's finding that the Union's loss of majority among Petitioner's bargaining unit employees was caused by unfair labor practices committed by Petitioner's officers.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional amendment and statutes, all of which are set out verbatim in the Appendix:

A. The First Amendment to the Constitution of the United States.
B. 29 U.S.C.A., §157.
C. 29 U.S.C.A., §158(c).
D. 29 U.S.C.A., §158(d).
E. 29 U.S.C.A., §159(c) (1).
F. 29 U.S.C.A., §159 (e) (1).

V. STATEMENT OF THE CASE

Local 826, International Union of Operating Engineers, AFL-CIO, was certified by the National Labor Relations Board as the bargaining representative of Petitioner's employees on August 10, 1966; a contract was entered into between Petitioner and the Union on November 16, 1967, to be effective on that date and for ninety (90) days thereafter, and to continue in force and effect unless either party should notify the other of its intention to renegotiate the contract, which notification would automatically terminate the contract sixty (60) days from its date. Such a notice was delivered to Petitioner by the Union in June of 1968. The first bargaining session for a new contract was held July 24, 1968, before the old contract had expired. The Union was represented by its then Business Agent, Frank Parker, in bargaining sessions through October 4, 1968. Thereafter, it was represented by its current Business Representative, Kenneth Howell. Respondent was represented by its President, Frank Thompson.

Petitioner and the Union met for five formal bargaining sessions after February 1, 1969, the date Petitioner allegedly commenced its refusals to bargain in good faith. The first such meeting occurred on February 12, 1969, and adjourned with an agreement the parties would reconvene on March 5, 1969; that meeting was cancelled by a representative of the Federal Mediation Service who was unable to attend; the meeting was rescheduled for March 13, 1969, but Respondent's lawyer was unable to attend and the second meeting eventually occurred on March 18, 1969. Upon adjourn-

ment of that meeting, the parties agreed to meet again April 8, 1969, and that meeting took place as scheduled; Petitioner's President presented graphs and charts comparing his wage scale with that of his competitors and told the Union negotiator business was bad and he had fewer rigs running than ever in the past thirteen years. Mr. Howell replied he knew business was bad all over the oil field and felt it was not a good time to be negotiating. He suggested adjournment for an indefinite period until he contacted Petitioner to arrange another session. Nothing further was heard from the Union until Mr. Howell requested a meeting for June 4, 1969; Respondent's lawyer was not available until June 17, 1969, when another meeting was held, but the lack of bargaining sessions between April 8 and June 4 resulted from the Union's suggestion that meetings be postponed until business improved. At the June 4 session, Respondent's President requested a negotiating session for the following week, but Mr. Howell refused to meet and bargain, and set a deadline of June 20, 1969, for Respondent to answer his demand for a 20 cent per hour across-the-board wage increase. On that date, Petitioner's lawyer advised Mr. Howell Petitioner agreed to the wage increase and they arranged to meet for another negotiating session on July 1, 1969. At the July 1 session the parties reached agreement on every question except the bumping procedures clause to be included in a new contract. The Union representative refused to negotiate on this question and left the meeting intending to take a strike vote, which proved to be a dismal failure from the Union's standpoint. However, it was not until 30 days after that July 1 bargaining session that the Union filed its unfair

labor practice charge accusing Petitioner of not bargaining in good faith. In the interval between the last bargaining session and the filing of the charge the Union's strike vote had been unsuccessful, 81% of the bargaining unit employees had stated they no longer wanted to be represented by the Union, Petitioner had notified the Union it no longer recognized it as the bargaining representative of its employees, and Petitioner and certain employees had filed decertification petitions with the Regional Director.

Petitioner became aware of its employees disaffection from the Union on July 13, 1969, when one of its officers, Ted Toft, saw writings to that effect signed by 125 of the 154 bargaining unit employees. Between that date and July 19, 1969, Petitioner's President, Frank Thompson, addressed the employees who worked on all drilling rigs except Rig #2 on the subject of the Union and his negotiations with them. He addressed the employees of Rig #2 on July 11, 1969, but the only three employees from that rig who signed a petition had done so before July 10, 1969; so it is chronologically impossible that those speeches were the procuring cause of any of the signatures on the employees' statements of disavowal of the Union. Two employees who were instrumental in circulating the anti-union petitions testified the Union held strike vote meetings on July 3, 1969, from which they came away convinced the Union no longer had the support of a majority.

Federal jurisdiction in the United States Court of Appeals for the Fifth Circuit is conferred by 29 U.S.C.A., §160(e).

VI. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE OPINION OF THIS COURT SET OUT IN *H. K. PORTER COMPANY, INC. VS. NATIONAL LABOR RELATIONS BOARD*, 397 U.S. 99, 90 S. Ct. 821 (1970) AND WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *UNITED STEEL WORKERS OF AMERICA, AFL-CIO VS. NATIONAL LABOR RELATIONS BOARD VS. FLORIDA MACHINE AND FOUNDRY COMPANY, ET AL.* 441 F. 2d 1005 (CA-D.C., 1970), AND *INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, VS. NATIONAL LABOR RELATIONS BOARD*, 416 F. 2d 809 (CA-D.C., 1969),

A question of exceptional importance is raised by the Opinion of the Court of Appeals that Petitioner's conduct at the bargaining table failed to display the degree of diligence required by the National Labor Relations Act. That part of the Court's Opinion is in conflict with the decision of this Court in *H. K. Porter Company, Inc., vs. National Labor Relations Board*, 397 U. S. 99, 90 S. Ct. 821 (1970), as well as the Decision of the United States Court of Appeals for the District of Columbia in *United Steel Workers of America, AFL-CIO vs. National Labor Relations Board vs. Florida Machine and Foundry Company, et al*, 441 F. 2d 1005 (CA-D.C., 1970).

The Opinion mentions first that Petitioner failed to meet with the Union at reasonable intervals, citing evidence of protracted negotiations and few meetings between the parties, but it was at the instigation of the Union, not Petitioner, that no bargaining sessions were held between April 8 and June 4. A meeting took place June 17, and on June 20, Petitioner agreed to the Union's proposal for a wage increase which had been the principal question negotiated for almost a year. The parties met again on July 1, and were in substantial agreement on every provision for a new contract with the single exception of bumping procedures.

The Board found that Petitioner's request that the Union bargain on bumping procedure after all other items had been agreed upon constituted a maneuver on the part of Petitioner to avoid entering into an agreement with the Union, but employers are not compelled by the Act to concede to bumping procedure provisions proposed by a Union without bargaining; to the contrary, bargaining over contract provisions is the mutual obligation of the Employer and the representative of the employees (29 U.S.C.A., §158(d)). Petitioner did not refuse to bargain, it requested that the Union bargain over bumping procedures. It was the Union representative who refused to bargain further, left the room and called a strike vote which showed that the Union no longer had the support of a majority of Petitioner's employees. The Board and the Court below found this loss of support resulted, at least in part, from the Union's inability to reach an agreement on a contract and, accordingly, have

ordered Petitioner to bargain further with a Union which Petitioner's employees no longer want. This part of the Opinion is in conflict with the holding in the *Porter* case, supra, that the Act as presently drawn does not contemplate that Unions will always be secure and able to achieve agreements with employers when their economic position is weak.

In the *Porter* case the Board found the refusal of the Employer to grant a dues check-off clause was based on a desire to frustrate agreement and not on any legitimate business reason, and that motive constituted grounds for compelling it to execute a contract containing such a provision, but this Court held the Board's function is to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties:

> "It cannot be said that the Act forbids an Employer or a Union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H. K. Porter, Inc. vs. National Labor Relations Board*, 397 U.S. 99, 109.

Thus, the finding of the Board and the Court below that Petitioner's request to bargain further over bumping procedures was not proper is in conflict with the *Porter* case. It also conflicts with the interpretation of that decision by the United States Court of Appeals for the District of Columbia in *United Steel Workers of America vs. NLRB*, supra. In the *Steel Workers* case the Court found evidence from which to conclude

the Employer was not acting in good faith and that there was evidence of hostility toward the Union in the harshness of the contract terms proposed. Further support for the bad faith thesis was gained from evidence that the Employer dragged its feet when urged by the Union to schedule frequent negotiating sessions. Based upon these findings, the Board ordered the Employer to cease and desist from such behavior and offer reinstatement to certain workers who had been on strike. The Court held since the Employer met with the Union and actively worked on contract proposals, it is necessary to take a close look at his behavior during negotiations and at his proposals before concluding he had no desire to reach an agreement. The Court refused to approve the Board's finding of bad faith; it held the Board erred by adding to the Employer's obligation to bargain with the Union in good faith an obligation to concede to Union demands for certain contractual terms, citing the *Porter* case. The similarity of the Board's fact findings in the *Steel Workers* case and the present case and the contrast in the Opinions of the Courts of Appeal indicate a conflict between the Fifth Circuit and the District of Columbia Circuit on this important question of Federal law.

The Record contains no substantial evidence to support the Board's finding that Petitioner promoted decertification proceedings or induced the employees to sign the documents repudiating the Union. The talks Frank Thompson made to the employees, referred to in the Opinion of the Court below, took place after the employees' statements disavowing the Union had already been signed. Nevertheless, the Court held the

Board was entitled to order Petitioner to bargain further rather than conduct the decertification election petitioned for by Petitioner, as well as its employees.

This part of the Court's Opinion is in conflict with the Opinion of the Court of Appeals for the District of Columbia Circuit in *International Association of Machinists and Aerospace Workers, AFL-CIO, vs. National Labor Relations Board*, 416 F. 2d 809 (CA-D.C., 1969), where the Court held:

> "The legal principles relating to withdrawal of recognition of a bargaining representative are well settled. Absent special circumstances, the union enjoys an irrebuttable presumption of majority status for one year after certification. Thereafter, the presumption continues but becomes rebuttable upon a showing of "sufficient evidence to cast serious doubt on the union's continued majority status." At that point, the burden shifts to the General Counsel to prove that, on the critical date, the union in fact represented a majority of the employees." 416 F. 2nd 811-812
>
> "The pertinent standard "serious doubt," has two components: a reasonable basis in fact, and good faith." 416 F. 2nd 812
>
> "Since an affirmative showing of this nature is ordinarily not feasible, good faith may, absent evidence to the contrary, be inferred from

the existence of a reasonable basis for doubt." 416 F.2d 813

The lack of any bona fide evidence of bad faith on the part of Petitioner is illustrated by the Board's finding Petitioner unilaterally instituted a wage increase, even though the Board admits in the only foot note to its Decision and Order that the Union had agreed in writing it had no objection to putting the wage increase into effect.

This Court has held that one year after certification an Employer may ask for an election or, if he has fair doubts about the Union's continuing majority, he may refuse to bargain further with it. *Brooks vs. National Labor Relations Board,* 348 U.S. 96, 75 S. Ct. 176 (1954), citing the Board's Decision in *Celanese Corp. of America,* 95 NLRB 664.

Certainly the written statements of 81% of Petitioner's bargaining unit employees is adequate to create a reasonable basis in fact for Petitioner's doubt about the Union's majority status. The Board's finding that alleged bad faith bargaining on the part of Petitioner contributed to the Union 's loss of majority is not supported by substantial evidence and its findings that the alleged unilateral wage increase and Mr. Thompson's speeches to the employees further contributed to the loss of majority are not supported by any evidence. The Record contains no evidence of threats or promises of benefit uttered by Mr. Thompson so his speeches cannot be construed as evidence of unfair labor practices. 29 U.S.C.A., §158(c).

Accordingly, the Opinion of the Court below that Petitioner violated the Act by refusing to bargain further with the Union and requesting a new election is in conflict with the Opinion of the Court of Appeals for the District of Columbia in the *International Association of Machinists and Aerospace Workers* case, supra.

CONCLUSION

For the foregoing reasons, and each of them, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies each of Petitioner's Petition for a Writ of Certiorari has been placed in the United States Mail, air mail, postage prepaid, addressed as follows:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Honorable Marcel Mallet-Prevost
Asst. General Counsel
National Labor Relations Board
Washington, D.C. 20570

and the undersigned hereby certifies that three (3) copies of Petitioner's Petition for a Writ of Certiorari has been placed in the United States Mail, postage prepaid, addressed as follows:

Honorable Jack Q. Tidwell
Attorney at Law
P. O. Box 1311
Odessa, Texas 79760

this the ____ day of February, 1972.

BROOKS L. HARMAN
One of the Attorneys for
Petitioner

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 71-1130
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

A. W. THOMPSON, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(October 25, 1971)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

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*Rule 18, 5 Cir.: see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

AINSWORTH, Circuit Judge: The National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 151, petitions for enforcement of its order issued against A. W. Thompson, Inc. on June 30, 1970, 184 N.L.R.B. No. 14.[1] Billy J. Armstrong, an employee of Thompson, has intervened as the alleged representative of 125 of 154 employees (81%) in the bargaining unit. He supports the Company's position in full. Alternatively, he asks us to amend the Board's order so as to "guarantee to these Employees the right of a decertification election regardless of whether or not one is wanted by the Board or by the Union." The question before us is whether there is "substantial evidence on the record considered as a whole" to support the Board's findings and order. 29 U.S.C. § 160(e).

After careful consideration of the record as a whole, we find substantial evidence to support the Board's findings, and therefore enforce the Board's order.

A. W. Thompson, Inc. is engaged in the business of drilling oil wells. The Union entered into a collective

---

[1] The Board ordered Thompson to (1) bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO, the sole bargaining representative of approximately 154 employees of Thompson, in the bargaining unit in question, duly certified by the Board after election on August 10, 1966; (2) to post notices to employees to the effect that the Company will not interfere with the rights of the employees to select their own bargaining representative and to bargain with said representative; (3) to cease and desist from certain unfair labor practices found by the Board and from interfering with, restraining or coercing its employees in the exercise of their Section 7 rights, 29 U.S.C. § 157; and (4) to notify the Regional Director what steps have been taken.

bargaining agreement with Thompson on November 16, 1967. The contract provided for a termination date 90 days after notice by either party. On June 3, 1968, the Union notified Thompson of its desire to amend the agreement and demanded negotiation. The Board found that by July 1, 1969, there was agreement on all terms. But Thompson refused to sign the agreement claiming that it had reservations concerning the "bumping" clause. The Union called a meeting for a strike vote but only 2 out of 154 employees attended the meeting, indicating that the Union's strength had obviously dissipated. Indeed, during the first two weeks of July, at the behest of Company President Frank L. Thompson and other supervisory personnel, 125 out of 154 employees signed petitions stating that they no longer wanted the Union to represent them. They petitioned the Board for a decertification election. The Union countered with charges of unfair labor practices against Thompson. The Board dismissed the decertification petition and scheduled hearings on the charges.

The Board found that Thompson failed to meet with the Union at reasonable intervals for the purpose of collective bargaining. The record shows that negotiation of the new agreement was protracted. Meetings between the parties were few. The Company as evidence of its good faith maintains that agreement was in fact reached on all but one item (the "bumping" clause). A collective bargaining agreement is a whole composed of many parts. However, all parts must be complete. On September 10, 1968, the Company disapproved of the bumping clause in the old contract. On March 18, 1969, it suggested some "grammatical

corrections" in the proposed clause. At a meeting on July 1, 1969, the parties discussed and agreed on all terms of the agreement, item by item. When the bumping clause was reached, the Company again demanded certain "grammatical corrections." The Union agreed. This was the only item of disagreement because the Union dropped all other demands. Nevertheless, Company President Thompson refused to sign the agreement and again raised the bumping clause matter, stating that he needed more time to examine it and to confer with officers of his Company about it. In the weeks following this action, the Company refused even to negotiate with the Union, unilaterally withdrawing recognition of the Union as bargaining representative of its employees.

Section 8(d) requires employers and representatives of employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ...." We have held on numerous occasions that while the duty does not compel either side to make concessions, it does require that the parties "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement ...." *Globe Cotton Mills v. National Labor Relations Board*, 5 Cir., 1939, 103 F. 2d 91, 94. See also *N.L.R.B. v. Texas Coca-Cola Bottling Company*, 5 Cir., 1966, 365 F. 2d 321; *Majure v. National Labor Relations Board*, 5 Cir., 1952, 198 F. 2d 735; *N.L.R.B. v. Herman Sausage Co.*, 5 Cir., 1960, 275 F. 2d 229; *National Labor Relations Board v. Whittier Mills Co.*, 5 Cir., 1940, 111 F. 2d 474; *Stonewall Cotton Mills v. National Labor R. Board*, 5 Cir., 1942, 129 F.

2d 629; *National Labor Relations Board v. Athens Mfg. Co.*, 5 Cir., 1947, 161 F. 2d 8; *Tex Tan Welhausen Company v. N.L.R.B.*, 5 Cir., 1969, 419 F. 2d 1265, remanded, 397 U. S. 819, 90 S. Ct. 1516 (1970), modified on other grounds, 5 Cir., 1970, 434 F. 2d 405. "The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence." *National Labor Relations Bd. v. Reed & Price Mfg. Co.*, 1 Cir., 1953, 205 F. 2d 131, 139-140, cert. denied, 346 U. S. 887, 74 S. Ct. 139 (1953).

The Trial Examiner found that the Company "failed to display the degree of dilligence [sic] that proper performance of its bargaining obligations required." The Board agreed with the Trial Examiner and we find that there is substantial evidence to support the Board's finding.

Closely related to respondent's violation of Section 8(d) is the Board's finding that the Company had no sincere intention of reaching an agreement with the Union in violation of Section 8(a)(5) and (1) of the Act.

The Trial Examiner found, and the Board agreed, that "the Thompson demand at the July 1 meeting to review the bumping procedures after all other items had been agreed upon, and after Respondent had earlier indicated its consent to the bumping procedures, constituted a maneuver on the part of the Respondent to avoid entering into an agreement with the Union." The Examiner concluded that the Com-

pany "did not ever intend to enter into agreement with the Union." It is settled that "withdrawal by the employer of contract proposals, tentatively agreed to by both the employer and the union in earlier bargaining sessions, without good cause, is evidence of a lack of good faith bargaining by the employer in violation of § 8(a) (5) of the Act...." *American Seating Company of Mississippi v. N.L.R.B.*, 5 Cir., 1970, 424 F. 2d 106, 108. There is substantial evidence on the record as a whole to support the Board's finding of a violation of Section 8(a)(5).

The Board found a further violation of Section 8(a) (5) when the Company unilaterally effectuated a wage increase. On June 20, the parties had fully agreed to increase wages by 20 cents an hour across the board. The Company wanted to put the increase into effect immediately, but the Union resisted, desiring to incorporate the increase into the final collective bargaining agreement. The Trial Examiner found that "on July 13, without consultation with the Union or a written contract the Respondent put the 20-cent across-the-board wage increase into effect." The Company defends on the ground that the Union had consented to institution of the increase. But the Board found, and we agree, that the Union's purported consent to the increase, following two separate requests to incorporate the increase into the final collective bargaining agreement, arose "only after [the Union] was convinced that the Respondents had no intention of entering into an agreement." Rather, "the Respondent's whole course of action .... is indicative of the fact that it intended to and did place this wage increase

in effect upon its own initiative," in violation of Section 8(a)(5) of the Act, see *N.L.R.B. v. Katz*, 369 U. S. 736, 82 S. Ct. 1107 (1962); *General Electric Co., Battery Prod., Cap. Dept. v. N.L.R.B.*, 5 Cir., 1968, 400 F. 2d 713.

Finally, the Board found violations of Section 8(a)(1) by the Company for withdrawing recognition from the Union as the sole bargaining representative of its employees. An employer may refuse to bargain with a Board-certified union only when he in good faith believes that the Union no longer represents the bargaining unit employees. *N.L.R.B. v. Movie Star, Inc.*, 5 Cir., 1966, 361 F. 2d 346, 351; *Skyline Homes, Inc. v. N.L.R.B.*, 5 Cir., 1963, 323 F. 2d 642, cert. denied, 376 U. S. 909, 84 S. Ct. 662 (1964). At the expiration of the old agreement, Thompson conducted a "secret" poll which showed that a majority of the Company's employees wanted the Union to continue representing them. A year later, when Thompson refused to bargain, 81% of the employees signed petitions to the effect that they no longer wanted the Union. The Company and intervenor Armstrong assert that the Union became weak by its own doings. The Trial Examiner found to the contrary: "... after the July 1 meeting, the Respondent set out on a course of conduct which, I find, was calculated to discourage adherence to the union cause. ... Thompson engaged in talks to employees in which he placed the onus for their not receiving wage increases on the Union; in which he stated he would not sign a contract with the Union; and in which he then attempted, and evidently succeeded in many cases, to persuade the employees to

sign the petitions expressing their desire to rid themselves of the Union. In addition, certain supervisors actually participated in posting the petitions and in urging employees to sign." These activities constitute a violation of Section 8(a)(1) of the Act. As we stated in *N.L.R.B. v. Birmingham Publishing Company*, 5 Cir., 1958, 262 F. 2d 2, 7: "Section 8(a)(1) of the Act makes it unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union-repudiating document, particularly where the solicitation is strengthened by express or implied threats of reprisal or promises of economic benefit."

In *Medo Photo S. Corp. v. National Labor R. Board*, 321 U. S. 678, 64 S. Ct. 830 (1944), the Supreme Court stated that a company "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will." 321 U. S. at 687, 64 S. Ct. at 835. In *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 64 S. Ct. 817 (1944), the Court recognized that issuance of a bargaining order, as opposed to ordering an election, was well within the discretion of the Board. "The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers

might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation." 321 U. S. at 705, 64 S. Ct. at 819.

We have recognized that the Board, as a remedy for the Company's unfair labor practices, may impose a bargaining order on "at least two grounds: (1) the refusal to let an employer benefit by his own wrongs and (2) the insistence that a union which has won the right to bargain is allowed to enjoy that right." *General Electric Co., Battery Prod., Cap. Dept. v. N.L.R.B.*, 5 Cir., 1968, 400 F. 2d 713, 730. See also *Franks Bros. Co. v. National Labor Relations Board*, *supra*, and *Skyline Homes, Inc. v. N.L.R.B.*, 5 Cir., 1963, 323 F. 2d 642, cert. denied, 376 U. S. 909, 84 S. Ct. 662 (1964). A bargaining order is appropriate even in the absence of proof that the Union's loss of majority was attributable to the unfair labor practices which had been perpetrated by the Company. In *N.L.R.B. v. Movie Star, Inc.*, 5 Cir., 1966, 361 F. 2d 346, we found that "[w]hile it may be that at some earlier point in time the Respondents might have validly asserted a good-faith doubt as to the Union's majority status, they did nothing to dispute that majority status until August 28, when the course of conduct found by the Board to have been violative of the Act was in high gear. The effect of Respondents' numerous Section 8(a)(1) violations was to transform a possible good-faith doubt of the Union's majority into a bad-faith virtual certainty," 361 F. 2d at 351.

More recently, in *J. P. Stevens & Co., Inc., Gulistan Div. v. N.L.R.B.*, 5 Cir., 1971, 441 F. 2d 514, we recognized as did the Trial Examiner herein, that many

of the employees of the Company might not have been affected by the Company's unfair labor practices, and that many of the employees, in the exercise of their free choice would not chose the Union in any event. "But the Board's evaluation of the propriety of a bargaining order cannot be based on employee motivations, determined individual by individual. We cannot require the Board to engage in the hopeless and impossible task of evaluating the subjective reasons for each employee recantation." 441 F. 2d at 527. The Trial Examiner found that "the loss of majority caused in whole or in part by Respondent's unfair labor practices does not justify its refusal to bargain and, under the circumstances, the Respondent cannot be said to have entertained a good-faith doubt as to the Union's majority status. To hold otherwise would result in permitting Respondent to profit from its own unlawful refusal to bargain."

We find substantial evidence on the record considered as a whole to support the Board's findings of Section 8(a)(1), Section 8(a)(5), and Section 8(d) violations upon which the bargaining order was predicated. The Board's choice of remedy must "be given special respect by reviewing courts." *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575, 612, 89 S. Ct. 1918, 1939 n. 32 (1969). We decline to amend the order to "inform these Employees and the Board of their right to a decertification election" as intervenor requests. The Board has made a choice between two available remedies. Its choice is amply supported by substantial evidence.

The Board's order is ENFORCED.
Decision and Order of the National Labor Relations Board.

A. W. THOMPSON, INC.

and Case No. 16-CA-3683

LOCAL 826, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Rendered June 30, 1970.

DECISION AND ORDER

(June 30, 1970)

On March 18, 1970, Trial Examiner Morton D. Friedman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed timely exceptions, and a brief in support thereof, to the Trial Examiner's Decision. The General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions,[1] and recommendations.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

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[1]The Trial Examiner in his Decision expresses the following conclusion "... on July 13, *without consultation with the Unions* or a written contract the Respondent put the 20-cent across-the-board wage increase in effect." (Emphasis supplied). The Respondent in its exceptions contends that this conclusion of the Trial Examiner is erroneous. We do not agree. The Respondent's reliance upon the fact that on July 11, Howell in a letter to Respondent stated the Union would not object "to your (Thompson) putting the increase into effect" is misplaced. As Howell testified, after two previous requests to include the increase in a written agreement he agreed to the increase only after he was convinced that the Respondents had no intention of entering into an agreement.

The record discloses that the parties on June 20, 1969, had come to full agreement as to a 20-cent across-the-board increase, however, the Respondent refused to incorporate such increase in a written agreement as requested by the Union. It is also clear, as found by the Trial Examiner, that the Respondent had no intention of signing an agreement with the Union. Thompson, on or about July 13, came to Rig #10 and told the employees that he would like to give the employees a pay increase but the Union wouldn't let him without signing a contract and he didn't want to sign one. Further, he stated that he was going to go ahead and put a wage increase into effect this date. At the same time he mentioned to the rig crew that petitions were being circulated for a union election (decertification) and offered his help. He also reiterated that he was not going to sign a contract with the Union. Thus, in our opinion, the Respondent's whole course of action, as set forth by the Trial Examiner in his Decision, is indicative of the fact that it intended to and did place this wage increase in effect upon its own initiative.

ORDER

Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, A. W. Thompson, Inc., Midland and Odessa, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[2]

Dated, Washington, D. C. June 30, 1970.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
(SEAL) National Labor Relations Board

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29 U.S.C.A., Section 157:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a la-

bor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

29 U.S.C.A., Section 158(c):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not consitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C.A., Section 158(d):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employ-

ees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing

contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

29 U.S.C.A., Section 159(c) (1):

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section; or (ii)) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the

record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C.A., Section 159(e)(1):

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

FIRST AMENDMENT TO THE CONSTITUTION OF UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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IN THE

Supreme Court of the United States

No. 71-1032

A. W. THOMPSON, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

and

BILLY J. ARMSTRONG,
Respondents.

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

TRIAL EXAMINER'S DECISION

(March 18, 1970)

Statement of the Case

MORTON D. FRIEDMAN, Trial Examiner: Upon an original charge and first and second amended charges filed on August 1, 1969, August 8, 1969, and September 8, 1969, respectively, by Local 826, International Union of Operating Engineers, AFL-CIO, herein called the Union, the Regional Director for Region 16 of the National Labor Relations Board, herein called the Board, issued a complaint on September 10, 1969, on behalf of the General Counsel of the Board against

A. W. Thompson, Inc., herein called the Respondent or the Company, alleging violations of Section 8(a) (1) and (5) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. In its duly filed answer to the complaint the Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice the hearing in this case was held before me in Midland and Odessa, Texas, on October 7, 8, 9, and 10, 1969. All parties were represented and were afforded full opportunity to be heard,[1] to introduce relevant evidence, to present oral argument, and to file briefs. Oral argument was waived. Briefs were filed by counsel for the General Counsel, the Respondent, and the Intervenors. Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each of the witnesses as they appeared before me, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a Texas corporation, with its principal office and place of business in the city of Midland, Texas, and a yard office in the city of Odessa, Texas, is engaged in the contract drilling business in various

[1] At the hearing a number of employees were allowed to intervene through counsel on the basis of their interest in the outcome of this decision and upon their allegation that they no longer wanted the Union to represent them. Permission was granted for the intervention.

counties in the State of Texas and Lea County in the State of New Mexico. During the year immediately preceding the issuance of the complaint herein, a representative period, the Respondent performed services valued in excess of $50,000 for customers located outside the State of Texas.

I find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Background and Issues

Pursuant to a stipulation for certification upon consent election, an election was held on August 2, 1966, among the Respondent's employees who were engaged at the Respondent's oil drilling rigs in west Texas and New Mexico and Respondent's employees engaged in its yard in Odessa, Texas, essentially a production and maintenance unit. A majority of the employees voted for the Union and on August 10, 1966, the Union was certified by the Board as collective-bargaining representative of the aforesaid employees.

Thereafter, following bargaining, the Respondent and the Union entered into a bargaining agreement dated November 16, 1967. By letter dated June 3, 1968,

the Union notified the Respondent of its intention to amend the agreement and asked for available dates for negotiating. Ninety days after this letter, in accordance with contract provisions providing therefor, the bargaining agreement terminated.

Thereafter, between July 24, 1968, and July 1, 1969, both dates inclusive, the parties met for negotiating only about 10 times. Some of the meetings were fruitful some were not. At the last meeting, held July 1, 1969, as hereinafter set forth in greater detail, the parties were in agreement on virtually all items but with some minor exceptions. However, when the Respondent's representatives refused to execute a new agreement then and there, the Union's chief negotiator, Business Representative Kenneth Howell walked out and 2 days later, on July 3, 1969, held a strike vote meeting among Respondent's employees. Thereafter, on various dates in July, many of the employees signed petitions declaring that they no longer desired to be represented by the Union and, at about the same time, Frank L. Thompson, the Respondent's president, visited almost all of the rigs in the field and the Odessa yard, informally talking to the men about the affairs of the Respondent. After Union Business Representative Howell tried to resume negotiations, the Respondent instituted a wage increase it had offered at the July 1 meeting and, by letter dated July 25, 1969, informed the Union that it no longer recognized the Union on the alleged ground that it had evidence the Union no longer represented Respondent's employees. Thereafter, both the Respondent and some of the employees filed petitions for decertification of the Union, which

petitions were dismissed upon the filing by the Union of the charges upon which the complaint herein is based.

The complaint alleges, in substance, and the General Counsel contends, that in President Thompson's July 1969 talks to the employees at the rigs, Thompson urged the employees to sign the petitions and that other supervisors of the Respondent did likewise and that in his talks at some of the rigs, Thompson also told the assembled employees that Respondent was not going to sign a bargaining agreement with the Union. The General Counsel alleges that this conduct was violative of Section 8(a)(1) of the Act.

Additionally, the complaint alleges that the Respondent refused to bargain in good faith with the Union in that it refused to meet at reasonable times for the purpose of bargaining; that Respondent insisted it needed more time to consider the wage and bumping procedure provisions in the Union's proposal when, in fact, it had no intention of signing an agreement and was using the time to attempt to dissipate the Union's majority and that Respondent finally unlawfully refused to meet with and continue recognizing the Union upon the purported evidence that the Union no longer represented a majority of Respondent's employees at the time and under the circumstances set forth.

The Respondent denied all of these allegations and contentions maintaining that the Respondent had a good-faith doubt as to the Union's majority status. Additionally, as a separate and distinct affirmative de-

fense the Respondent alleges that, in any event, it was and is under no duty to bargain with the Union because the Union does not, in fact, represent a majority of the Respondent's employees.

B. *The Facts*

1. The negotiations and failure to meet with the Union

Although at the hearing many items which were discussed at the various bargaining sessions were testified to, it would unduly lengthen this Decision to set forth all of these matters herein. Accordingly, the discussion is confined to those matters which are in contention.

It should be noted, at the outset, that at all of the bargaining meetings held between the parties, the Respondent was represented by Frank L. Thompson, Respondent's president, and Risher M. Thornton, one of the members of the law firm representing the Respondent. Commencing with the first bargaining session held on July 24, 1968, through the bargaining sessions of October 4, 1968, the Union was represented by Frank Parker, then business manager of the Union. Parker was the predecessor-negotiator to Kenneth Howell, the present business agent of the Union. The Union was also represented at the various bargaining sessions by various employee-members.

There is little in the record to reveal what occurred at those bargaining sessions held from July 24, 1968, to October 4, 1968. However there are two items of sig-

nificance which were brought out at the hearing. First, Thornton testified that at the September 10, 1968, meeting the Respondent voiced its disapproval of the bumping procedures of the expired contract and of the Union's proposal. According to Thornton the bumping procedure was not agreed on at that meeting and the matter was not disposed of at that time. Of equal significance is a letter written August 20, 1968, by Frank Parker, as business manager of the Union, to Risher M. Thornton, as attorney for the Respondent, which partially reads:

> I take this method to advice [sic] you that in the future I will expect to meet on a more regular basis for these negotiations than we have met in the past. I feel that one two hour meeting in the past two months has not been in the best interests of the people I represent. Therefore, in the future I will request that we meet in negotiations on a much more frequent basis.

Thereafter, the parties met on September 10 and 16 and October 4, 1968. On December 10, 1968, the first meeting took place at which Howell acted as the chief spokesman for the Union. Also attending that December 10 session was a representative of the Federal Mediation and Conciliation Service who was called in because up to that point, at least, nothing had been agreed upon between the Respondent and the Union. At that session Thompson, for the Respondent, announced that he had given the drillers, who were supervisors on the drilling rigs, a 12-cent-a-mile allowance for operating their cars to and from their homes to

the rigs. Howell immediately objected to this on the ground that the same allowance should have been given to the roughnecks (the term used to designate the rank-and-file employees on the rigs). Howell also complained that this allowance, since it affected the roughnecks, should not have been given by the Respondent without consultation with the Union.[2]

Among the items discussed at the December 10, 1968, meeting was the question of wages. At that time, the Union was requesting a 40-cent-per-hour wage rate increase, among other things. However, the Respondent at the end of that meeting declined to offer any wage increase whatsoever. Other matters were discussed but nothing was actually agreed upon. At the end of the session the company negotiators, Thornton and Thompson, agreed with Howell to meet for another bargaining session on January 8, 1969, in Thornton's office.[3]

However, on the day before the January 8 scheduled meeting, Thornton's secretary called Howell and advised Howell that Thornton was not available to meet with Howell and the others because Thonton was in Alaska. The secretary and Howell arranged a new meeting date for January 15, 1969. However, on January 14, Thornton's secretary again called Howell and notified him that Thornton was again unavailable to meet because he was still in Alaska. Finally Howell and Thornton's secretary agreed on a meeting date

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[2]This item is mentioned solely as background and no unfair labor practice is based thereon.

[3]All of the bargaining sessions that Howell attended took place in Thornton's office.

after Thornton was to return from Alaska. This date was February 12 and that meeting was held.

Again the representative of the Federal Mediation Service was present. The meeting started wtih Howell presenting Thornton, Thompson, and the Mediation Representative a copy of a proposed union contract. Among other things, this contract called for a wage rate increase of 50 cents per hour for the employees and it also contained the same bumping and seniority clauses which had been part of the previously expired bargaining agreement between the parties. Thompson rejected the Union's request for a 50-cent-per-hour wage increase and gave as his reason therefor that he was in line with what his competitors were paying. At the end of the meeting, or sometime toward the end of the meeting, Howell requested of Thompson that the Respondent present a counterproposal to the Union proposal at the next meeting.

Before the meeting ended, the parties agreed to meet on March 5, 1969. However, the March 5 meeting was canceled by the Federal Mediation Service due to the inability of their representative to attend. The parties then firmly agreed to meet on March 13, 1969. However, this meeting was also canceled by the Respondent attorney's secretary calling Howell and telling him that Thornton was unavailable. It was stipulated at the hearing that Thornton was in Dallas, Texas, on March 13. A new date was set for March 18.

The March 18 meeting was held as scheduled. At the meeting the Company presented the Union with

its counterproposal. The parties went through the counterproposal item by item and checked the items with the Union's proposal to see what the Company wanted to change or would not agree to. According to Howell, this was the first meeting he attended at which the bumping procedures were mentioned. In the Respondent's counterproposal the only comments which were made with regard to the bumping procedures, articles V.1 and 2 of the Union's proposal, were suggestions by the Respondent to make some grammatical corrections. The Union acceded to this request. According to Howell, the Respondent's representatives at that meeting made no further reference to the bumping procedures as set forth in the Union's proposal. According to the testimony of both Thompson and Thornton, however, the Respondent's representatives made it clear that the Respondent did not want to go along with the bumping procedures and, indeed, wanted to see this section of the contract eliminated completely. However, with regard to Respondent witnesses' testimony as to this matter, I find that Thompson was very vague as to dates and that Thornton at first stated that Thompson was the one who stated that he opposed the bumping procedure and then changed his testimony to state that perhaps it was Thornton, himself. Neither of them appeared to be certain as to whether or not the bumping procedure was discussed at that meeting aside from their mere assertion that it was discussed. From my observation of the witnesses, the manner in which they testified, and the fact that Howell appeared to have a clear recollection of what occurred at the meetings, I credit the version of Howell. Accordingly, I find and conclude that the

bumping procedure was not mentioned at the March 18 meeting except for what was contained in the Respondent's counterproposal to make grammatical changes in the Union's proposal. Nor do I credit Thornton's testimony to the effect that the reason that a more definitive counterproposal on the bumping procedure was not included was because of Thornton's inadvertent neglect to do so. This counterproposal starts off with the paragraph which reads "The following changes are proposed in the contract submitted by Local 826 on February 12, 1969" and then lists the changes that it proposes. I cannot conclude that an attorney of Thornton's apparent ability and experience would have written into the counterproposal proposed grammatical changes and inadvertently have omitted the most important part that he contended he wanted to include; namely, that the Respondent did not choose to have any bumping procedures in the agreement at all.

At the March 18 meeting there was also a detailed discussion concerning wages. Thompson repeated that he was already equal to many of his competitors and felt that his employees were being paid close to what his competitors were paying. He said also that the 12 cents per mile which he was paying the drillers for transportation was costing him a great deal already. It should be noted at this point that the drillers were furnishing transportation for the other employees on the rigs. Thompson did admit, however, in comparing what he was paying with some of his competitors, that perhaps he was $150 a week cheaper per rig in total. Howell then started to figure what the $150 a week would

amount to in hourly wages and the Union modified its demands at that point. Howell told Thompson that the latter could give 20 cents per hour across the board and that would come to only $156 a week per rig. Howell said that Thompson could give this and would still be competitive. Thus, the Union had come down 30 cents per hour in this wage demand. Nevertheless, although Thompson did not turn down the offer he said he would have to go back to his people and figure out whether he could give it. At the end of the meeting no specific date was set for the next meeting but sometimes before April 8 Howell called Thornton and asked for a meeting date and Thornton gave him the date of April 8.

The April 8 meeting did take place as scheduled. The session began with Howell asking Thompson what the latter had come up with on the Union's demand for the 20-cent-an-hour across-the-board wage increase. Again, Thompson came up with comparisons with what he paid and what his competitors were paying. They talked at great length about what the other contractors were paying and how much Thompson was under the other contractors in his wages. Thompson said that the cost of transportation was as much as $50 or $60 per day per rig and that some of the companies for whom he was drilling were reimbursing him for this but some were not. Then Thompson stated that he had less rigs running at that time than he had had since 1956. Howell admitted that he knew Thompson's rigs were running at a minimum and that about half of them were not running at all. Accordingly, before the meeting broke up, Thompson said that he would not give any wage increase. Howell countered with the

fact that he knew that many of Thompson's rigs were down and that this was not a good time to be negotiating wages and that he understood Thompson's business. Howell added that he would contact Thompson again for further negotiations when Thompson's rigs were running again. Thornton stated two or three times during the course of the meeting that it looked as though they were at an impasse. However, Howell told Thornton that they had not reached an impasse and they still had a lot to talk about. Thus, the April 8 meeting broke up without any date being set for the next meeting. It should be noted that although other matters were discussed in addition to wages, nothing was mentioned about the bumping procedures.

Sometime thereafter Howell called Thornton and a meeting was arranged for June 4, 1969. However, the June 4 meeting was not held. On the day before the meeting was scheduled, at approximately 5 p.m., Thornton's secretary called Howell and explained that Thornton was not available to meet and canceled the meeting. She explained that Thornton was in Alaska. However, at the hearing it was stipulated that Thornton was in San Francisco on June 3 and 4 and he did not return until June 7. According to Thornton, this was a necessary business trip. At the time that Thornton's secretary canceled the meeting scheduled for June 4, she stated that Thornton would be available on June 10 and suggested that they meet on that date. Howell agreed. However the meeting was not held on June 10. At about 9:30 of the morning of that day Thornton's secretary again called Howell and said that Thornton was not available. It was stipulated on the record that

Thornton had to remain in San Francisco until June 11. All the secretary told Howell, however, was that Thornton was out of town. During that phone conversation Thornton's secretary suggested that they hold the meeting on June 17 because Thornton would definitely be back at that time.

The June 17 meeting was held as scheduled. At the beginning of the meeting Thornton stated that he had been in Alaska. Howell asked if Thornton would be available and Howell complained about the infrequencies of the meetings. Thornton said that he had to be away and that he had hoped that his business had been taken care of. Then Howell asked the Respondent's representatives if they were ready to give the wage increase. Thompson began talking once again about the average cost of transportation for the rigs. With that Howell told Thompson that he knew that the Respondent's rigs were almost all running again and that was the reason they were back there and that he had asked for a negotiation date. Thompson admitted that most of the rigs were running and that business had picked up considerably since the last time they had met. At this meeting Howell informed Thompson that some of the other drilling contractors had given their motor men and derrick men an adjustment in wages and Howell asked Thompson if the latter would give motor men and derrick men a 15-cent adjustment in wages. This adjustment was to come in the new contract. After all the arguments were made pro and con with regard to the 15-cent adjustment, Thompson said that he would take it back and discuss it with his officers. However, Thompson stated that he was not ready to discuss the

20-cent wage demand of the Union and he asked that they meet the following week because he thought that they would have an answer at that time. With that Howell said that he thought Thompson had delayed long enough and that he thought the people were justified in their demand and that he wanted an answer before the following week. Howell asked if it would be possible for Thompson to give him an answer by June 20 because he wanted to incorporate this wage increase into the contract in addition to the adjustments for the derrick men and the motor men. However, Thompson at that meeting did not offer anything more than he was paying his employees at that time. Thereupon Thornton agreed that Howell should call Thornton on June 20 sometime during the morning, and that he would have an answer for Howell. The bargaining session ended shortly after that. The entire session took only about 30 minutes and no mention was made of the bumping procedures.

On the morning of June 20 Howell called Thornton. He asked Thornton whether Thompson was going to give the 20-cent wage increase and after some further conversation Thornton said they were going to give the wage increase and also a few adjustments, that Thompson was looking at the adjustments and Thornton said the wage increase would be a minimum of 20 cents. With that Howell asked when they could get back together and complete negotiations for a new working agreement and incorporate the wages in it. Thornton answered that they were willing to put the wages into effect at that time. Howell replied that he did not want that, that he wanted the earliest negotia-

tion date because he wanted to incorporate the wage increase in with the working agreement inasmuch as the Union wanted a complete working agreement. With that Thornton answered that he was afraid that Howell was going to say that. However, they agreed to a meeting date which was to be July 1.

On July 1 a meeting was held as arranged. The meeting began with the parties discussing the proposal and counterproposal item by item. When they came to the bumping procedure, Thornton pointed out that the proposal contained a comma in section V. 1. This comma had been put after the word "rig" in the second sentence and at the end of a sentence in V. 2 they had the word "employee" which should have been plural, "employees." In the third sentence of V. 2 there should have been a period after the words "14 days." Howell and the Union agreed to these changes. Thus the changes and the bumping procedures were completely disposed of before wages were discussed. When the discussion began with regard to wages Thompson presented a list of proposed wages that he wanted to put into effect for the various classifications of the employees. During the discussion the Union modified its position and asked that Thompson give the motor men and derrick men each a 6-cent differential over the other employees. This was a reduction of considerable amount. Thompson did not agree to it at that moment. Then Thompson offered to grant the wage increases to the employees but never offered to incorporate the increases in the contract. Then the discussion went back to the 6-cent adjustment which the Union asked instead of its 15-cent adjustment for the derrick men

and motor men. Thompson countered with "I'll tell you, let's look at our bumping procedure, our article on bumping procedure." At that point nothing was done about Thompson's suggestion and the Union agreed to drop a number of its other demands. Thus, for example, the Union agreed to drop time and a half after 8 hours in any 24-hour shift. The Union also dropped its demand for a 2-week vacation after 1 year of service. It also dropped its demand that the bargaining employees be paid 12 cents a mile to and from their homes to the rigs.

Thus, at about this point in the meeting the parties were in agreement on virtually everything, but Thompson had not yet agreed to incorporate the wage increases into the agreement and he went back to the bumping procedure provisions. Thompson said that he wanted to look at the bumping procedures and the 14-day recall provisions of the proposed contract. Howell then asked him what they wanted to talk about that item for because they had already agreed to it. Thompson answered that they had not agreed on it. Then Howell reminded Thompson that the Respondent had made no mention of it in its counterproposal and that they had never discussed it before. Howell expressed his thought that they had agreement on it and Thompson said that he wanted to look at it again. Howell asked Thompson if he was having any trouble with it and Thompson answered "No, not that I know of, but I want to look at it." Then Thompson also stated that article V. 5, a clause which required the employer to furnish the list of employees at the end of each two-week pay period, was causing him trouble. Howell an-

swered that he thought that sending such a list every 6 months instead of every 2 weeks would suffice. Thornton answered for Thompson that he did not see that there would be any trouble in this matter. Again Howell stated that they were not apart on anything. Then Thompson countered that he wanted to take the bumping procedure and the seniority list procedures back to his officers. Finally Howell said "All right. Forget the 6 cent adjustment. Will you sign the contract now?" Thompson answered "No, I can't. I have to take it back to my people. We have got to have more time to look at it." To which Howell countered "Thompson, you've been looking at that contract since June 4, 1968, and I think you are just stalling for time. I don't think there's anything [sic] that you will sign a contract."

Thompson answered that he needed more time and that they should meet the next week. He mentioned the date of July 8. Howell said he wanted to meet that afternoon and when that met with protest Howell said that he would meet the next day. Thompson said he couldn't do that and Howell again asked that they meet the day after, July 4, Thompson was adamant and said that he would not meet with Howell until July 8. Howell told Thompson that that was not going to be satisfactory, that Thompson had stalled and delayed the matter long enough. Howell went on to say that as long as he felt that there was any justification for the matter he was going to do whatever he could to force Thomp-

son to sign a contract. The meeting thereupon ended at about 12:30 p.m.[4]

It should be noted that Howell left the meeting somewhat angered. His last remark to Thompson was "Thompson, I won't call you. You will be calling me." However, it should also be noted that at the end of the July 1 meeting the bumping procedure was the only matter which held the parties apart. This bumping procedure had not been mentioned by the Respondent's representatives at any time to Howell until the July 1 meeting except insofar as the grammatical suggestions were made in the Respondent's counterproposal submitted March 18.

It should be further noted, that at no time during any of the bargaining sessions or any of the telephone conversations between Howell and Thornton's office or between Howell and Thornton or Thompson was Howell ever told that it would be agreeable to Thornton to have Brooks Harman, Thornton's law partner, negotiate in Thornton's place at any time if Thornton was not available.[5]

The July 1 bargaining session was the last meeting held with regard to negotiating the contract between the parties.

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[4]All of the foregoing with regard to the bargaining sessions is taken from the testimony of Howell which was not, for the most part, in disagreement with the testimony of any of the Respondent's witnesses. However, as noted above, where there was conflict in testimony as to what occurred at the bargaining sessions I have credited Howell for the reasons stated.

[5]Neither Thornton nor Thompson testified that such a suggestion was made to Howell. The question was asked Howell on cross-examination if such a suggestion was ever made to him and Howell denied that it was.

It is also of some significance that at no time from December 11, 1968, to July 1, 1969, was any meeting initiated at the request of any Respondent representative.

2. The Postnegotiation Events

After Howell left the meeting on July 1, he instructed his Odessa business representative to make contact with as many Thompson employees as possible to call a strike-vote meeting. Such meetings were held at Odessa and Monahans, Texas, on July 3. Strike votes were taken at the meetings and a majority of the employees present voted to strike. However, because so few of the employees attended the meetings, Howell did not feel that it was a representative vote. About 9 o'clock that night, July 3, Howell called Thornton and told the latter that a strike vote had been taken and the majority of the employees present voted to strike but that it was not a representative vote. Therefore, Howell asked Thornton to tell Thompson that the Union would take the July 8 meeting date. Thornton answered that Thompson was pretty angry and was out of town for the weekend and Thornton could not contact Thompson. He added that he did not know whether Thompson would want to meet July 8, that Thompson might have made other plans and that Howell should call Thornton the following Monday morning, July 7. On July 7, Howell called Thornton and asked Thornton if the latter had reached Thompson. Thornton stated that he had, but that Thompson already made plans and would not be available to meet July 8. Upon receiving this information, Howell asked Thornton for the earliest possible

date when negotiations could be continued. Thornton gave Howell the date of July 29. Howell was not satisfied and told Thornton that he would like to get together earlier to put the raises into effect. Thornton informed Howell that the Respondent had mailed a letter to Howell which stated that they desired to put the new raises into effect on July 13. Howell answered "no, I will not agree to that. I want to put the money in with the whole contract and I think it should be done in negotiations."

Thereafter the Union did receive the letter of which Thornton spoke stating that the Company proposed to place into effect new pay scales approximating 20 cents per hour per man effective the pay period commencing July 13. The letter stated that if the Respondent did not hear from the Union to the contrary they would assume that the Union was agreeable to the raises. Howell did answer giving his consent because he did not want the men to lose the opportunity to receive the wage rate increases. Thereafter, the Respondent posted and announced the wage rate increases as stipulated in the letter of July 7. After the conversation with Thornton on July 7, Howell had no further personal contact with any representative of the Respondent, and for reasons hereinafter set forth there were no further negotiations.[6]

In addition to the information which Thornton received from Howell to the effect that a representative vote had not been taken at the strike meetings, Theo-

[6]From the uncontroverted testimony of Howell which I credit.

dore J. Toft, administrative assistant to Thompson, testified, without contradiction, that on July 5, employee Claude A. Johnson came to Toft's office and described what took place at the strike-vote meeting mentioning the number of people who attended. Johnson told Toft that the vote taken was 21 to 9 in favor of a strike, making a total of 30 employees who attended. According to Toft, at that time there were approximately 154 employees in the unit.

Toft also had a conversation on July 5 with employee Jerry Singleton, who told Toft, as did employee Johnson, that he did not believe the Union had a majority. Singleton stated that not only he but other men were highly interested and concerned and they wanted to know what they could do about getting rid of the Union. Toft told Singleton that the initiative would have to be their own, that they would have to do it for themselves.

Nevertheless, despite this admonition from Toft to the effect that if the men wanted to get rid of the Union they would have to do it on their own, and despite Thompson's protestations that he would not involve himself in any activity by the employees to rid themselves of the Union as their bargaining representative, events began to unfold shortly after the July 3 strike vote which indicated the Respondent did become involved in an attempt to get rid of the Union.

There is no doubt, and all parties concede, that between approximately July 7 and July 17, 1969, petitions to the effect that the employees no longer wished to be represented by the Union were posted and signed

at the various rigs and at the Respondent's Odessa yard. These petitions were handed to the Respondent's vice president, Shaffer, and were sent, in turn, to the office of Brooks Harman, Thornton's law partner. A study of these petitions leads to the conclusion that Toft was correct in stating that there were approximately 125 signatures on the petitions. Since these petitions were introduced into evidence by the General Counsel who did not in any way attack their genuineness from the point of view of the signatures thereon, it can be concluded that as of that period in July 1969 following the strike vote; until the employees filed a petition with the Board for decertification, a vast majority of the employees of the Respondent indicated that they did not desire to have the Union represent them any longer. However, it is necessary to examine the manner in which these signatures on the various petitions were encouraged and solicited.

Thus, according to employee Kenneth O. Hamric, relief driller on rig 19, on Tuesday, July 8, 1969, he had a conversation on the rig floor with tool pusher Buck Kruse, an admitted supervisor. Kruse handed Hamric a document which in the first paragraph said in effect that the drillers had received a 20-cent increase in wages because they were not represented by the Union; that the Company would like to give the employees a raise but the Union would not let this happen unless the Company signed a contract. The statement went on to say that the Respondent did not intend to sign a contract. The document further suggested that it looked as if the only way the employees would receive the increase would be to get rid of the Union.

There followed instructions on how to get rid of the Union directing the employees to draw up a petition for a new union election; that the heading of the petition should be "We, the undersigned, do not want to be represented by the Union, Local 826."

The document was unheaded and unsigned and was typewritten in a distinctive type of script which, at the hearing herein, was compared with script from a typewriter in the Respondent's office and found to be similar. However, I cannot conclude that the document shown to Hamric by Kruse was written in the Respondent's office. This is so because the paper shown by Kruse to Hamric was not produced and there was no expert testimony to connect the document with the typed sample introduced at the hearing.

Suffice it to say, however, as soon as Hamric had finished reading the paper handed to him by Kruse, driller Bob Melton, also an admitted supervisor, handed a petition to Hamric which the latter signed. Hamric then passed on the petition to other members of the crew. After that, Kruse told Hamric that someone had to take the petition to Vice President Paul Shaffer and asked Hamric if the latter would do it. Hamric then posted the petition on the bulletin board for the other crews who worked on different shifts. He posted it in accordance with instructions given him by Kruse. Hamric left the petition on the bulletin board of the rig for 2 or 3 days. He took it down on approximately July 10, took it home with him, and the next morning turned it in to Vice President Shaffer. An examination of this particular petition signed by the em-

ployees on rig 10 convinces me after comparison with a sample of the known writing and printing of Supervisor-Driller Melton, that this petition was composed and printed by Melton.

When Hamric took the petition to Shaffer's office, the latter looked it over and stated that there were not as many names as he had hoped for. Shaffer added that he had a couple more petitions that had already come in from other rigs. Shaffer then stated that he needed about 85 or 86 names before the Respondent could go ahead and file for an election.

The following week Kruse brought the petition back to Hamric and Hamric reposted it. This time a single name was added to the petition. At the time that Kruse gave the petition back to Hamric he stated to Hamric that some of the men might want to sign it who did not sign it at its earlier posting and that Kruse wanted to give them another chance. The petition was then taken down for a second time but there was no showing in the record as to who took the petition down. However, as stated before, by the time it was taken down for the second time another signature had been added.

The second posting of the petition followed a talk to the employees that was given by Frank Thompson at the top doghouse of rig 10 on July 13, a Sunday. Present were Thompson, Melton, Hamric, and several others, six crew members altogether. Thompson stated that he would like to have given the men a pay increase of 20 cents an hour but the Union would not let him do so unless he signed the contract and he did not

want to sign a contract. He said that he was going to go ahead and put the wage increase into effect that date, July 13, in any event. Thompson then reminded the men that there was a petition being circulated calling for a union election and he said if enough people sign the petition he, Thompson, would be glad to take it from there. He added that some of the petitions had been turned in and if anyone wanted them brought back he would be glad to have them brought back so that persons who missed the opportunity the first time around would have a chance to sign up. Thompson further stated that the Union had outlived its usefulness and he was not going to sign a contract with the Union. He explained that when he had first signed a contract with the Union the union representatives had told him that they would not be back to bother him until they had some of his competitors under contract.[7]

In addition to the foregoing incident concerning Hamric, driller Jerry Baskett, an admitted supervisor, testified without contradiction that he posted the petition which was signed by employees of rig 6 on July 6 and left it posted until July 10.

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[7]All of the foregoing from the credited, virtually uncontroverted testimony of witnesses Hamric and W. A. Stevenson. Neither Melton nor Kruse testified. Although Thompson, in his testimony, denied having made any statements with regard to the petition or with regard to the Union at his talks with the men at the rigs, I find and conclude that Hamric's and Stevenson's testimony is reliable. Moreover, although Toft also stated that he accompanied Thompson, in the latter's visit to the various rigs, and further testified that he did not hear Thompson make any such statements, he admitted that at some of the rigs and at some of the other places where Thompson gave talks to the men he, Toft, was otherwise busy and did not hear the entire conversations between Thompson and the employees. For these reasons I credit the entire testimony of Hamric and Stevenson.

At another meeting held on July 8, 1969, at rig 2, Thompson told the gathered employees about the benefits the employees enjoyed such as group insurance, safety awards, driving pay, hospitalization, and so forth, stating that he was proud of his operation and that he "didn't need any damn union out there running his business." Thompson then mentioned that the only way the employees could get rid of the Union would be for at least half of them to sign a petition to that effect. He also informed the employees that the reason they had not received a pay raise, as had the drillers, was because the Union would not accept his offer of 20 cents hourly. After Thompson's talk the meeting was thrown open to discussion and employee Vernon L. Trease asked Thompson if the employees rid themselves of the Union would they still have a guaranteed salary. Thompson answered that he did not intend to do away with any benefits just because there was no union and he did not intend to cut salaries.

Thereafter, on about July 10, a petition appeared on the bulletin board of rig 2. Employee Trease at that time had a conversation with his driller, James Williams, an admitted supervisor, who told Trease that he ought to "go in there and sign the petition." Trease did not sign the petition nor was there any showing in the record who posted the petition or who took it down.[8]

Another incident occurred which involved Thompson and his talk with employees from rig 8, and several

[8]All of the foregoing from the credited testimony of employee Trease. Williams did not testify.

other rigs, which was held at the Odessa yard office on about July 15. Present were about 28 to 30 employees from the various rigs just mentioned. The employees were told to attend this meeting by their various drillers. After Thompson introduced himself to the men, he stated that the Union was not helping the men or Thompson and that the Union was not paying the men anything; that the checks they received came from the Respondent. Thompson further said that he had put a petition up in the rigs for his employees to sign to help them get the "Union out of the Company." Additionally, Thompson stated that it was unfair to him because he had to get a least 80 percent of his employees to sign the petition to get the Union out whereas the Union had to have only 20 percent to get itself voted in. Thompson continued that he did not like fence straddlers and wished the men would go along with him; that if they could not see their way clear to do so they could quit. He added it did not make any difference what organizations the employees belonged to but that he just wanted them to help him get rid of the Union. Them Thompson went on to discuss how the Company was founded by his father and gave additional history of the Respondent. He also told of all the benefits that the employees were receiving. He stated that he was going to try to continue the benefits and would try to give more if it was at all possible.

About the same time that Thompson gave his talk a petition was posted at the doghouse of rig 8. Employee Hogan saw it around July 9 or 10. At that time Hogan's driller, Eddy Fitzgerald, told Hogan that the petition was up there and went on to explain to Hogan

that it would be a help to Thompson to get the Union out of the Company. Hogan did not know who put the petition up or who took it down.[9]

On July 8 or 9, employee Stevenson had a conversation with Bob Melton, the driller on rig 10. This is the same rig on which employee Hamric worked. Melton told Stevenson "Steve, you might ought to sign that," referring to the petition. Stevenson stated that he could not afford to sign the petition and Melton said nothing further.

Another similar incident occurred between employee Gary E. Thompson at rig 2 and tool pusher Cy White, an admitted supervisor. White told Gary Thompson

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[9]From the credited testimony of former employee Hogan. I have taken into consideration the fact that Hogan was discharged sometime before the hearing herein and, for that reason could have been biased. However, from my observation to Hogan and from the fact this his testimony confirms testimony of other witnesses whom I have credited, I find and conclude that Hogan's testimony was credible. In connection with the talks by Thompson to the men at the various rigs I have taken into consideration the testimony of Respondent's witnesses Johnson, Singleton, Armstrong, Blakeley and Green. It is possible that at some of the rigs Thompson did not mention the Union petition nor his desires to get rid of the Union. However, on the basis of all of the testimony that I have considered, I find and conclude that the testimony of Hogan, and others who testified similarly to him, is the more accurate version of what took place at the particular rigs. I have also taken into consideration the testimony of W. A. Black, a witness called by the General Counsel, who testified to the same meeting as did Hogan. His testimony is very similar to that of Hogan and I therefore credit it. However, Black testified he was not present during the entire meeting. I find that Black's testimony was not as complete as was Hogan's. Therefore the matters to which Hogan testified, while not completely substantiated by Black, are accepted as the true version of what occurred.

that they needed to get a petition up on the bulletin board for any of those that wanted to sign it.[10]

As noted above, the petitions were submitted to Shaffer's office. Aside from Hamric's testimony as to what occurred when he took the petition to Shaffer, the record is barren with regard to Shaffer's own reaction to the petitions. Toft, as heretofore noted, saw the petitions in Shaffer's office and counted the signatures on the petitions which, as heretofore noted, amounted to approximately 125. Shaffer caused the petitions to be taken to Brooks Harman's office.

Thereafter, a number of the employees from rig 6, together with some of the employees from the Respondent's Odessa yard, went to Brooks Harman's office, asked Harman for the petitions, and took the petitions to the office of their selected attorney who, later on, filed a petition with the Board for decertification of the Union. The record does not reveal how the employees knew the petitions were in Brooks Harman's office.

As heretofore set forth, Union Business Representative Howell had a conversation with Respondent Counsel Risher Thornton on July 7 in which the wage increase was discussed and a date of July 29, 1969, was set for the next bargaining session. Howell testified credibly and without contravention that this was the last discussion Howell ever had with any of the representatives of the Respondent. The reason for this is

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[10]From the credited testimony of Gary Thompson. White did not testify.

that the July 29 meeting never took place. On July 25, 1969, Thompson addressed a letter to Howell which stated as follows:

> This company has been furnished evidence which we believe definitely proves Local 826 does not represent a majority of our employees. Under these circumstances this company advises you it no longer recognizes Local 826 as bargaining agent for our employees. Please be advised that the negotiating session scheduled for Tuesday, July 29, 1969 is cancelled.

Both Thompson and Toft testified as to the reasons this letter was written. Although they each denied that the petitions were the main reason for the Respondent's professed belief that the Union no longer represented a majority of the employees, in point of time the refusal to meet and negotiate on July 29 followed the filing of the petitions in Vice President Shaffer's office and the admitted reading of the petitions by Administrative Assistant Toft. Accordingly, the Respondent cannot be found innocent of knowledge of the fact of the petitions. Therefore, I find and conclude that although there may have been some doubt in the minds of Thompson and other company officials that the Union no longer represented a majority of the Respondent's employees, and this belief may have been strengthened by the weak showing at the July 3 strike-vote meeting, it is nevertheless apparent that the petitions were the basis for Respondent writing this letter of July 25 notifying the Union that the Respondent no

longer recognized it as the bargaining representative of the Respondent's employees.

C. Analysis and Concluding Findings

Overriding all of the subsidiary issues, the dominant issue presented is whether the Respondent, in its negotiations with the Union, performed the obligation to bargain as prescribed by Section 8(d) of the Act "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment..." To resolve the question of whether this obligation was met by the Respondent, it is necessary to analyze the pattern of Respondent's conduct to determine whether the Respondent came to the bargaining table with the intention of arriving at an ultimate agreement with the Union or whether the Respondent's conduct negated such intention.

The first aspect of Respondent's conduct that bears scrutiny is that involving the paucity of bargaining meetings. Thus, over a period of approximately 1 year there were only 10 such meetings, none of them called at the initiative of the Respondent's representatives. Indicating that the cause of the rarity of the meetings cannot be laid at the feet of the Union is, initially, the letter of August 20, 1968, sent by Union Representative Parker to the Respondent in which Parker took the Respondent to task for the fact that only a single meeting of 1 hour's duration had taken place in the 2 previous months. The record does not explain why only three meetings took place thereafter from August 20 to December 10, 1968, but the record is replete with

instances thereafter as to the reasons that appointments for meetings were not kept by the Respondent and why postponement after postponement occurred. Thus, the meeting set for January 8, 1969, was postponed because of Attorney Thornton's absence and a meeting was not held until February 12, 1969, for the reason that Thornton was not available. Nor is there any evidence in the record that anyone else was appointed by the Respondent to take Thornton's place in his absence.

Again, at the end of the February 12 meeting the parties set March 5 as the next meeting date. However, this meeting was canceled by the Federal Mediation Service due to the inability of their representative to attend. The parties then firmly agreed on March 13, 1969. However, this meeting was also canceled because the Respondent's attorney, Thornton, was again unavailable. Finally a meeting was held on March 18.

After the March 18 meeting, a meeting was set for April 8 and this meeting was held. However, at the end of the April 8 meeting no date could be arranged and thereafter Howell, the union business agent, called on Thornton and finally a meeting was arranged for June 4, 1969. However, the June 4 meeting was not held because of Thornton's absence from the city. The meeting was postponed to June 10. However, in the morning of that day the meeting was again canceled because Thornton was again unavailable. Finally, a meeting was held on June 17.

Thereafter another meeting was held on July 1 and at the end of this meeting no date was set because the Respondent would not agree to sign a contract. However, at the end of that meeting Respondent did offer to meet on July 8. Nevertheless, 2 days later when Howell called to say that he would accept the July 8 date, Thornton explained to Howell that Thompson, the Respondent's president, was angry about what occurred at the July 1 meeting and Thornton could not promise when Thompson would be available. Finally on July 20 a meeting was arranged for July 29, but this meeting was never held. The Respondent refused to enter into any further bargaining because it expressed, in a letter addressed to the Union, that it thought that the Union no longer represented a majority of the Respondent's employees.

Section 8(d) imposes a mutual obligation on negotiating parties "to meet at reasonable times." Moreover, Section 204 of the Labor Management Relations Act, in order "to prevent or minimize interruptions in the free flow of commerce," calls on employees and unions alike to "arrange promptly" for conferences and to endeavor "expeditiously" to bring about a resolution of disputes over contract terms in which they may be engaged. The duty to do so is part of the obligation to bargain.[11]

The record in the instant case, as just described supports the conclusion that the Respondent failed to display the degree of dilligence that proper performance

[11] *"M" System, Inc.*, 129 NLRB 527, 548.

of its bargaining obligations required. This is so whether or not delays were inspired by a deliberate scheme to engage in dilatory tactics. Although the Respondent attorney's situation in having other business to take care of besides that of the Respondent may be sympathized with, nevertheless, it was the duty of the Respondent to see to it that if Thornton was not available a substitute should be appointed so that the bargaining meetings need not be postponed on so many occasions. Thus, the Board has held, referring to Section 8(d) obligation:

> The manner of the performance of this obligation by the negotiator is relevant in determining whether there has been a good-faith discharge of this positive legal duty imposed by statute. If a given negotiator becomes indisposed or is otherwise unable to discharge this responsibility because of other commitments, it is the duty of the party involved to designate a negotiator who can fully discharge this obligation. Passively waiting for the other party to make all requests for bargaining meetings, protracted delays in arranging for the meetings requested by the other party, and failure to advise as promised when another meeting could be arranged, are variations of negative conduct which has been held by the Board and courts to impede the bargaining process and otherwise frustrate negotiations so as to evidence a lack of regard for this aspect of the bargaining obligation.[12]

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[12] *Exchange Parts Company*, 139 NLRB 710, 714.

Tested by the foregoing standards, it is apparent that the Respondent failed to meet its Section 8(d) obligation to meet at reasonable times. Accordingly, I find that by reason thereof the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. That this violation of the Act had an effect on the employees and their relation to the Union is discussed below.

The next aspect of Respondent's conduct to be considered is the Respondent's attitude at the bargaining table with regard to the wage and bumping provisions of the Union's proposal and the Respondent's counter-proposal. Initially, the Respondent refused, through President Thompson, to even consider, because it was beyond Respondent's means, the 50-cent-per-hour wage rate increase of the Union's original proposal. There was in this obstinancy, standing alone, nothing unlawful or necessarily indicating an intention not to arrive at an agreement with the Union. At most it could be classified as hard bargaining since the Act does not impose upon any party the obligation to concede but only to "confer in good faith" with an open mind.

In addition to wages, there was the additional item of the bumping procedure provisions of the Union's proposal. Attorney Thornton testified, without contradiction, that either he or Thompson had opposed the bumping procedures incorporated in the expired bargaining agreement during the meeting held with Union Business Representative Parker at the September 10, 1968, bargaining session. Thereafter, the Union's proposal in the form of a complete agreement which con-

tained the exact bumping procedure provisions was submitted by Business Agent Howell for the Union at the March 18, 1969, bargaining meeting. This proposal also contained the Union's request for a 50-cent overall wage increase. At the next meeting, held March 18, the Respondent submitted its written counterproposal which rejected in whole the wage increase but accepted the bumping procedures in that it contained only suggestions for some grammatical changes in that portion of the Union's proposal. Thus, it is obvious, that any opposition which the Respondent might have earlier shown to the bumping procedures was withdrawn. I have heretofore found that nothing further was said at the March 18 meeting regarding bumping.

Neither was anything said about bumping at the April 8 meeting which followed. However, at this meeting the Union lowered its sights to a 20-cent wage increase but again the Respondent pleaded inability to pay because many of its rigs were down. At the June 17 meeting, the parties were again silent as to bumping and the 20-cent increase was discussed once more, this time Thompson stated he would have to take it back to his officers. Then, on June 20, by phone, Thornton informed Howell that Respondent desired to put the 20-cent wage increase into effect and Howell countered to the effect that he wanted an early negotiation date so that the wage increase could be incorporated into a new contract. To this Thornton replied that he was afraid Howell was going to say that.

Finally at the July 1, 1969, meeting which followed the June 20 phone conversation, the parties agreed on

virtually every point in dispute including wages, with the Union making most of the concessions. But when Howell asked if the Respondent would sign a contract then and there Thompson countered with a proposal to put the wage increase into effect without a signed agreement and added a statement to the effect that he wanted to look over the bumping procedures and had to take the bumping procedures back to his people for discussion. Howell then became angry, refused Thompson's request and the meeting broke up with no agreement and no contract.

Thereafter, on July 13, without consultation with the Union or a written contract the Respondent put the 20-cent across-the-board wage increase into effect.

The General Counsel contends that the Respondent's proposal to put the wage increase into effect when it would not, as yet, enter into a complete written agreement, and Respondent's last moment demand to reconsider the bumping procedures were maneuvers to keep from signing an agreement and an indication that Respondent never intended to enter into a collective-bargaining agreement with the Union. I agree.

When the Respondent submitted its counterproposal on March 18 no mention was made of any doubts or disagreement with the bumping procedures except for some suggested grammatical changes. Certainly, this indicated agreement with the bumping procedures proposal. Thus the Thompson demand at the July 1 meeting to review the bumping procedures after all other times had been agreed upon, and after Respondent

had earlier indicated its consent to the bumping procedures, constituted a maneuver on the part of the Respondent to avoid entering into an agreement with the Union. This conclusion is strengthened by other considerations.

First there is the request of Respondent to place the wage rate increases into effect before a whole agreement was reached and a contract signed. This was followed by the unilateral effectuation of wage increases on July 13 accompanied by speeches by President Thompson to the effect that the Respondent wanted to give the employees a wage raise but the Union did not want this to be done without a contract, and that Thompson did not intend to enter into a contract with the Union.

The foregoing, I find, constitutes ample evidence that Respondent did not ever intend to enter into agreement with the Union and thereby the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

I come now to the talks given by Thompson in the middle of July to the employees at the various rigs and at Thompson's Odessa yard. I have heretofore found that at least at some of these speeches, Thompson stated that he did not intend to enter into an agreement with the Union. It requires no citations to substantiate a finding that these statements by Thompson were violative of Section 8(a)(1) of the Act in that they discouraged the employees from supporting the Union and generally discouraged the employees from

engaging in concerted and union activity in violation of their Section 7 rights.

Next to be considered is the question of the petitions by the employees to the effect that they no longer desired to be represented by the Union. As set forth above, at at least two of the Respondent's rigs, supervisors were directly responsible for the posting of the petitions in the doghouses. That these were not the isolated acts of over zealous supervisors is demonstrated by the talks given by Thompson to the men at the various rigs at approximately the same time. Thus, at rig 10, not only was the petition urged and posted by the driller and took pusher on that rig, but in Thompson's talk to the employees of that rig he stated, among other things, that there was a petition being circulated calling for a union election and said that if enough people signed the petition he, Thompson, would be glad to take it from there. Thompson added that some of the petitions had been turned in and that if anyone wanted them brought back he would be glad to have them brought back so that the persons who missed the opportunity to sign the first time around would have a chance to sign up. He further stated that the Union had outlived its usefulness and that he was not going to sign a contract with the union.

Again, at rig 2, on July 8, Thompson told the gathered employees that he didn't need any "damn Union out there running his business." Thompson then mentioned that the only way the employees could get rid of the Union would be for at least half the men to sign a petition to that effect. He also informed the employees

that the reason they had not received a pay raise was because the Union would not accept his offer of 20 cents per hour. Thereafter, a petition did appear at rig 2.

Still another time at a meeting held on approximately July 15 in the offices of the Respondent with employees present from various rigs, Thompson said that he would put up a petition at the rigs for his employees to sign to help them get the "Union out of the Company." It is unnecessary to recite additional instances of similar speeches to employees. It would be well to note, however, that the petitions found their way to the Respondent vice president's office and from there to Respondent counsel's office.

By reason of all of the foregoing I find and conclude that the Respondent through Thompson and through its own supervisors solicted its employees to sign petitions repudiating the Union. Such activity on the part of an employer has been held many times by the Board to constitute violations of Section 8(a)(1) of the Act. I so find in the instant case.[13]

The final issue to be determined is whether the Respondent violated its duty to bargain by refusing to negotiate with the Union on and after July 25, 1969, on the ground it believed that the Union no longer represented a majority of the Respondent's employees. In contending that Respondent violated its duty to bargain, the General Counsel asserts that the Respondent's

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[13] *Winfield Mfg. Co., Inc.*, 173 NLRB No. 103, sec. III, B; *William L. Bonnell Company, Inc.*, 170 NLRB No. 14, sec. I, B, paragraphs (c) and (d) and sec. I, B, 2; *Hurd Corporation*, 143 NLRB 306, 318, and cases cited therein.

alleged belief was not grounded on good faith and in any event, assuming that the Union did in fact lose its majority status, the loss was due to the Respondent's prior unfair labor practices and, therefore, is no defense to the Respondent's refusal to bargain.

It is established that at the time of the expiration of the old contract between the Respondent and the Union the Union represented a majority of the employees since Respondent conducted a poll and the results showed a union majority. However, during July 1969 the employees' petitions, to the effect that they no longer desired the Union to represent them, contained 125 signatures out of a possible 154. On the surface therefore, the Union had lost its majority. But the cause of the loss of that majority must be examined.

I note first the protracted negotiations lasting over a year during which only about 10 meetings were held due in great measure to the Respondent's dilatory approach to the bargaining which I have heretofore found to have violated the Respondent's statutory obligation. I deduce from this that this long period of bargaining, from which there was little or no benefit which could inure to the employees, must have had a discouraging effect on the employees and their relation to the Union. Finally, after the July 1 meeting; the Respondent set out on a course of conduct which, I find, was calculated to discourage adherence to the union cause. As set forth above, Thompson engaged in talks to the employees in which he placed the onus for their not receiving wage increases on the Union; in which

he stated he would not sign a contract with the Union; and in which he then attempted, and evidently succeeded in many cases, to persuade the employees to sign the petitions expressing their desire to rid themselves of the Union. In addition, certain supervisors actually participated in posting the petitions and in urging employees to sign.

While it is entirely possible that enough of the employees might have withdrawn from the Union voluntarily had the Respondent not engaged in unfair labor practices to have destroyed the Union majority, the Respondent's conduct renders it impossible to determine how many employees would have so withdrawn. It therefore must be concluded that the defections of the Respondent's employees from the Union were attributable, at least in large and undeterminable part, to the Respondent's unfair labor practices. Under these circumstances, the union majority before the unfair labor practices will be presumed to have continued as a matter of law. Thus the loss of majority caused in whole or in part by the Respondent's unfair labor practices does not justify its refusal to bargain and, under the circumstances, the Respondent cannot be said to have entertained a good-faith doubt as to the Union's majority status.[14] To hold otherwise would result in permitting Respondent to profit from its own unlawful refusal to bargain.[15]

Therefore, by reason of all of the foregoing, I find and conclude that since August 2, 1966, the date of

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[15] *Franks Bros. Company* v. *N.L.R.B.*, 321 U.S. 702.

[14] *Movie Star, Inc.*, 145 NLRB 319, 340-341, affd. in pertinent part 381 F.2d 346 (C.A. 5).

the Union's certification, and continuing to all of the dates pertinent herein the Union has been and is the bargaining representative for the purposes of collective bargaining of all employees of the Respondent in the unit described as follows:

All of the employees of the Respondent working out of the Respondent's Odessa, Texas, facility, including employees working on rigs in the following counties: Yoakum, Terry, Gaines, Dawson, Andrews, Loving, Winkler, Ector, Midland, Glasscock, Reeves, Ward, Crane, ~~Upton,~~ Reagan, Pecos, Crockett, Terrell and Martin (all in Texas) and Lea County, New Mexico, and including truck drivers and maintenance employees working at the Respondent's Odessa, Texas, facility, but excluding office clerical employees, drillers, shop foremen, truck foremen, guards and supervisors as defined in the Act, as amended.

I further find and conclude that on the basis of the record as a whole that in refusing to meet and bargain after July 5, 1969, the Respondent has refused to bargain in good faith with the Union as the bargaining representative of its employees in violation of Section 8(a) (5) of the Act as alleged in the complaint herein.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade,

traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, it will therefore be recommended that the Respondent cease and desist therefrom.

It has been found that Respondent has refused in good faith to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit described herein. It will therefore be recommended that the Respondent bargain collectively, upon request, with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. A. W. Thompson, Inc., is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 826, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By sponsoring and urging its employees to sign petitions stating that its employees no longer desire to be represented by the Union and by advising its employees that it was not going to sign a collective-bargaining agreement with the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act and in violation of Section 8(a) (1) of the Act.

4. All employees of the Respondent working out of the Respondent's Odessa, Texas, facility, including employees working on rigs in the following counties: Yoakum, Terry, Gaines, Dawson, Andrews, Loving, Winkler, Ector, Midland, Glasscock, Reeves, Ward, Crane, Upton, Reagan, Pecos, Crockett, Terrell and Martin (all in Texas), and Lea County, New Mexico, and including truck drivers and maintenance employees working at the Respondent's Odessa, Texas, facility, but excluding office clerical employees, drillers, shop foremen, truck foremen, guards and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. On August 16, 1966, and at all times thereafter, the Union was, and now is, the representative of a majority of the Respondent's employees in the appropriate unit described above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing, on February 1, 1969, and continuing to date, to bargain collectively with the Union as the exclusive representative of all its employees in the above-described appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is ordered that the Respondent, A. W. Thompson, Inc., its partners, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Urging and assisting employees to draft and sign petitions to the effect that the employees no longer desire to be represented by the Union.

(b) Advising employees that it will not sign a collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

(d) Refusing to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the Respondent's employees in the unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment:

> All the employees of the Respondent working out of the Respondent's Odessa, Texas, facility, including employees working on rigs in the following counties: Yoakum, Terry, Gaines, Dawson, Andrews, Loving, Winkler, Ector, Midland, Glasscock, Reeves, Ward, Crane, Upton, Reagan, Pecos, Crockett, Terrell and Martin (all in Texas) and Lea County, New Mexico, and including truck drivers and maintenance employees working at the Respondent's Odessa, Texas, facility, but excluding office clerical employees, drillers, shop foremen, truck foremen, guards and supervisors as defined in the Act, as amended.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(1) Upon request, bargain collectively with the above-named Union, as the exclusive representative of

its employees in the above-described unit, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Odessa, Texas, facility, and at all the rigs operated by the Respondent, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the receipt of this Deci-

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[16] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

sion, what steps have been taken to comply herewith.[17]

Dated at Washington, D. C. March 18, 1970.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1130

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

A. W. THOMPSON, INC.,
Respondent.

Filed: Nov. 16, 1971

JUDGMENT

Before: BELL, AINSWORTH and GODBOLD,
Circuit Judges.

THIS CAUSE was submitted upon an application of the National Labor Relations Board for enforcement

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[17] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 16, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

of a certain order issued by it against Respondent, A. W. Thompson, Inc., its officers, agents, successors, and assigns on June 30, 1970. The Court having carefully considered the briefs and transcript of record filed in this case, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on October 25, 1971, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, A. W. Thompson, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: NOV. 16, 1971

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1130

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

A. W. THOMPSON, INC.,
Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-entitled case has this day been served by air mail upon the following counsel at the addresses listed below:

Turpin, Smith, Dyer, Hardie & Harman
Att: Joseph Connally, Esq.
1010 American Bank of Commerce Bldg.
Odessa, Texas 79760

Turpin, Smith, Dyer, Hardie & Harman
Att: Risher M. Thornton, III
Joseph Connally,
& Cue Boykin, Esqs.
300 First Nat'l Bank Bldg.
Midland, Texas

Deaderick McMahon, Cox
Todd & Tidwell
Att: Jack Q. Tidwell, Esq.
5th Floor, First State Bank Bldg.
P. O. Box 485
Odessa, Texas 70760

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 1st day of November, 1971.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1130

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

A. W. THOMPSON, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 25, 1971, 5 Cir., 197__, ____ F.2d ____).

(December 29, 1971)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

LIBRARY
SUPREME COURT, U. S.

No. 71-1032

In the Supreme Court of the United States

OCTOBER TERM, 1971

I. W. THOMPSON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD
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PETER G. NASH
General Counsel,
NORTON J. COME
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1012

A. W. THOMISON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 449 F. 2d 1333. The decision and order of the National Labor Relations Board are reported at 184 NLRB No. 14 (Pet. App. 11a-13a).[1]

JURISDICTION

The judgment of the court of appeals was entered on

[1] The Trial Examiner's decision, which the Board adopted, is set forth at pp. 1-50 of the Supplemental Appendix to the petition and at pp. 3-46 of the Appendix in the court below (hereafter referred to as "A.").

November 16, 1971, and a petition for rehearing was denied on December 29, 1971 (Pet. 2). The petition for a writ of certiorari was filed on February 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the employer refused to bargain in good faith with the union by failing to meet at reasonable times, by disavowing a proposal previously consented to in order to frustrate an agreement, and by withdrawing recognition from the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board's Findings of Fact

1. *The negotiations*

In 1967, the Union,[2] which had been certified after a Board-conducted election in 1967 (A.5), and the Company entered into a collective bargaining agreement subject to termination upon 90 days' notice by either party (A. 5, 477-491). When the Union notified the Company on June 3, 1968, of its intention to amend the agreement and asked for available dates for negotiating (A. 5), the Company conducted a poll in which it found that a majority of its employees favored the Union (A. 38; 77-80, 475-476).

On July 24, 1968, the parties met for the first time to negotiate a new agreement. The Company was represented at this and subsequent meetings by Frank L. Thompson, its president, and attorney Risher M. Thornton. (A. 7.) On August 20, the Union's business manager wrote to the Company, requesting that meetings be held more frequently in the future and complaining that this had not been done in the past (App. 8, 53-54, 457).

The parties met again on September 10, September 16, October 4, and December 10 (A. 8, 84-85). But the Company cancelled meetings scheduled for January 8, 1969, and January 15, 1969 (A. 9, 213-215).

When negotiations resumed on February 12, the Union presented a written copy of a proposed contract

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[2] Local 826, International Union of Operating Engineers, AFL-CIO.

providing for a wage increase of 50 cents per hour and containing the identical seniority clauses that had been part of the prior agreement between the parties (A. 9-10, 217-218, 337, 496-498). Company president Thompson rejected the requested 50-cent per hour wage increase on the ground that the Company was "in line with what [its] competitors were paying" (A. 10, 218-219).

At the next meeting on March 18, the Company presented its counterproposals, suggesting, among other things, "grammatical corrections" in a seniority clause, which the Union agreed to (A. 10, 221, 237, 370-371, 476, 496-497). With respect to wages, president Thompson acknowledged that the Company paid $150 a week less per rig than some of its competitors. The Union replied that, if the Company gave a 20-cent per hour increase across the board, this would come to only $156 a week per rig (A. 12, 222). Thompson said that he would have to go back to his office and do some more figuring (A. 12, 223-224).

The parties met again on April 8 and June 17,[3] but reached no agreement on wages (A. 12-13, 14-15). Neither party discussed the seniority procedure at these meetings (A. 13, 15, 227, 235, 236). On June 20, the Company advised the Union that it was "going to give the wage increase and also a few adjustments" and that the wage increase would be "a minimum of 20 cents." The Union asked for the "earliest negotiation

[3] Meetings had been set for June 4 and June 10, but the Company cancelled both on the ground that its attorney was not available (A. 13, 227, 229).

date" in order "to incorporate the wage increase in with the working agreement" (A. 15-16, 235-236). The parties agreed to meet on July 1 (A. 16, 236).

This meeting began by a discussion of the proposals and counterproposals, item by item (A. 16, 236-237). Upon reaching the seniority procedure, Company attorney Thornton pointed out that some grammatical errors had been made; the Union agreed to correct these (A. 16, 237.) President Thompson then presented a list of proposed wages that he wanted to put into effect for the various classifications, but he did not offer to incorporate them in the contract (A. 16, 238). The Union countered by agreeing to drop its demand for certain fringe benefits (A. 16-17, 239-240).

Thereupon, Thompson said that he "wanted to look at the bumping procedure" of the proposed contract (A. 17, 240). The Union asked him why he wanted to talk about that item since they had "already agreed" to it (A. 17, 240). When Thompson answered that they had not, the Union reminded him that the Company had never mentioned changing the proposal (A. 17, 240-241). The Union business agent, Howell, inquired if Thompson was "having any problems with it"; Thompson replied, "No, not any that I know of but I want to look at it." Thompson then stated he had trouble with a clause in the proposed contract requiring the employer to give the Union a list of employees at the end of each 2-week pay period (A. 17, 241). Howell said that sending such a list every six months would suffice and the Company agreed (*ibid.*). Howell then observed that they were not "apart on anything." Thompson,

however, refused to sign a contract, stating that he wanted to take the seniority procedure and list clauses back to his officers because "We have got to have more time to look at it" (A. 17-18, 242). Howell replied: "Thompson you have been looking at that contract since June 4th, 1968 [more than a year] and I think you are just stalling for time. I don't think there is any way that you will sign a contract" (A. 18, 242). Thompson insisted he needed "more time" and proposed that they meet the following week on July 8 (*ibid.*). Howell objected, stating that he wanted to meet that afternoon or the next day (*ibid.*).

2. *The Company's campaign to undermine the Union*

Two days later, business agent Howell called attorney Thornton and agreed to meet on July 8. Thornton, however, told Howell that Thompson was "damned mad" about the strike vote[4] and he did not know whether the latter would want to meet on July 8. When Howell called on July 7, the Company told him that the "earliest possible date" for resuming negotiations would be July 29. (A. 19, 243-244.)

Although refusing to execute the contract, the Company insisted on putting the 20-cent wage increase into effect on July 13. The Union initially objected, but finally agreed because it believed that the Company had no intention of ever signing a contract and it did not

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[4] After the July 1 meeting, the Union held two strike vote meetings at which a majority of the employees in attendance voted to strike. However, Howell considered the vote not representative because so few employees had attended. (A. 19, 243.)

want the employees to be deprived of the raise any longer (A. 19-20, 244-245, 458-462).

Meanwhile, on July 6, the Company initiated a drive to get its employees to sign petitions that they "do not wish to have the Union * * * represent" them (A. 21, 464-474). One supervisor posted a petition and invited employees to sign (A. 25, 160-161, 464). Another supervisor gave a written statement to an employee, urging him to sign a petition and advising that, if he did not, he might not receive the 20-cent raise. This supervisor also asked the employee to post the petition for other employees to sign and then deliver it to the Company vice-president, which he did. (A. 22-23, 131-132, 137-138, 472.) Other supervisors engaged in similar conduct (A. 26-27, 164-165, 175, 190-191).

In addition, Company president Thompson, at an employee meeting on July 8, listed all the benefits employees presently enjoyed, said that he did not "need any damned union out there running his business," and told the employees to sign the petitions (A. 25, 162-163). At another meeting on July 13, Thompson said that he would "like to give [the men] a pay increase of twenty cents per hour but the union wouldn't let him unless he signed a contract and he didn't want to sign a contract." He also said that, "if enough people would sign [the petition], he would be glad to take it from there." He volunteered to bring a petition out to the employees so they "could sign it" and repeated that he "wasn't going to sign a contract with the union." (A. 24, 145-146.) At a third meeting with the employees on July 15, Thompson said, "I have put a petition * * * out

in the rigs * * * for my employees to sign to help me get the union out of my company." He added that he did not "like fence straddlers" and wished the men "would go along with [him] and if [they] can't see [their] way clear [they] can quit." (A. 26, 172-174.)

Approximately 125 of 154 employees signed the petitions (A. 28, 395, 464-474). On July 25, the Company wrote to the Union, withdrawing recognition and cancelling the bargaining session scheduled for July 29 (A. 29, 462-463).

B. The Decisions Below

The Board found that the Company had failed to meet at reasonable times with the Union; that it had consented to and then disavowed seniority procedures in order to avoid entering into an agreement with the Union; and that it had unilaterally effectuated a wage increase (A. 32, 35-36; Pet. App. 12a, n. 1). The Board concluded that by this conduct, and by thereafter withdrawing recognition from the Union,[5] the Company refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act (A. 33, 35-36, 39-40). The Board further found that the Company had violated Section 8(a)(1) of the Act by sponsoring and urging its employees to sign petitions repudiating the Union and by threatening never to sign a contract with the Union (A. 36-37). The Board ordered the Company, *inter alia*, to bargain with the Union upon request (A. 43-44).

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[5] The Board found that any loss in the Union's majority was attributable to the Company's unfair labor practices (A. 39).

The court of appeals found "substantial evidence to support the Board's findings" and enforced its order in full (Pet. App. 2a).

ARGUMENT

The basic issue presented by the petition is whether substantial evidence supports the Board's findings that the Company bargained in bad faith and induced its employees to repudiate the Union (Pet. 2-3). Such an issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as the statement indicates (pp. 3-8 *supra*), there is ample support in the record for the Board's findings.

Petitioner's contention that the Board's order improperly "compel[s] [it] to concede to bumping procedure provisions proposed by a Union without bargaining" (Pet. 8) misconceives the Board's decision. The Board found that the Company and the Union had agreed on such a provision and that the Company, in bad faith, later insisted on a second look at that provision in order to avoid entering into an agreement with the Union (A. 35-36). Thus, *Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, is not pertinent; the Board there sought to compel the employer to accept a checkoff provision that it had never agreed to in the negotiations.[6]

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[6] The other cases relied on by petitioner are not inconsistent with the decision below. In *United Steelworkers* v. *National Labor Relations Board* (*Florida Machine & Foundry Co.*), 441 F. 2d 1005 (C.A. D.C.), the court, although acknowledging that there was "evidence in the record from which to conclude that the Employer

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,

National Labor Relations Board.

MARCH 1972.

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was not acting in good faith" (*id.* at 1007), remanded the case to the Board because, in the court's view, portions of the Board's decision suggested that it had predicated its finding of bad faith on the fact that it "did not approve of certain of the proposals advanced by the Employer in the course of negotiations" (*id.* at 1009). The court subsequently enforced the Board's decision in that case, order entered November 9, 1971, not yet reported. In *Lodges 1746 & 743, Int. Ass'n of Mach. & Aero. Wkrs.* v. *National Labor Relations Board* (*United Aircraft Corp.*), 416 F. 2d 809 (C.A. D.C.), certiorari denied, 396 U.S. 1058, the court merely found that the employer had a reasonable basis for doubting that the union retained its majority employee support, and had asserted that doubt in good faith. A different conclusion is warranted where, as here, the employer's unfair labor practices contributed to the union's loss of majority support.

☆ U.S. Government Printing Office: 1972—460-236/571